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No. 495

In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES OF AMERICA, PETITIONER

v.

COMMODORE PARK, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The District Court's findings of fact and conclusions of law (R. 11–30) are not reported. The majority and dissenting opinions in the court below (R. 36–44) are reported in 143 F. (2d) 720.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 23, 1944 (R. 44). The petition for writ of certiorari was filed on September 23, 1944, and was granted on November 6, 1944 (R. 46). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States, when it deepens a navigable body of water by dredging operations undertaken in aid of navigation and commerce, may deposit the dredged material in tributary waters without compensating riparian owners for the attendant loss of their riparian rights, including the right of access to deep water.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, of the Constitution of the United States provides that:

> The Congress shall have Power
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> * * * * *
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> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
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> * * * * *
>
> To provide and maintain a Navy;
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The Fifth Amendment to the Constitution provides, in part, as follows:

> * * * nor shall private property be taken for public use, without just compensation.

Sections 9 and 10 of the Rivers and Harbors Act of March 3, 1899, c. 425, 30 Stat. 1121, 1151, 33 U. S. C. 401, 403, provide as follows:

> SEC. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

SEC. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

STATEMENT

During the last war Congress established a naval base at Hampton Roads, Virginia (R. 13). In 1934 Congress authorized the acquisition of certain lands in the vicinity of Willoughby Bay, an appendage of Hampton Roads, to provide additional naval aviation facilities. Act of June 14, 1934, 48 Stat. 957. The necessary appropriations

were not made until 1939, when Congress authorized the acquisition by purchase or condemnation of other lands in the area for the same project. Act of April 25, 1939, 53 Stat. 590, 592; Act of May 25, 1939, 53 Stat. 757, 772–773. Pursuant to these statutes the Navy Department on June 28, 1940, entered into a contract with the Virginia Engineering Company, entitled "Contract NOy–4158, Aviation shore facilities at the Naval Air Station, Norfolk, Virginia", for work to cost $13,700,000 (R. 15). It was contemplated under this agreement that the Virginia Engineering Company would develop a large seaplane operating base in the southerly portion of Willoughby Bay by dredging operations which would provide 10 to 14 feet of water at mean low tide (R. 18, 19). The materials thus dredged by hydraulic methods from Willoughby Bay were to be deposited in the creeks, sloughs, and other low areas (principally Mason's and Boush Creeks, navigable streams which empty into Willoughby Bay at that point) behind steel bulkheads, dykes, and other retaining walls (R. 18–19).

Inasmuch as sections 9 and 10 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151, 33 U. S. C. 401, 403, make it unlawful to fill or dredge a navigable waterway of the United States unless the work is first approved by the War Department, the naval commandant applied for permits from the War Department for the dredging of Willoughby Bay and the filling in of

Mason's Creek and Boush Creek (R. 17–19). The necessary permits were granted by the War Department in July 1940 and May 1941 (R. 20–23). As a result of the dredging operations thereafter undertaken, some 18,000,000 cubic yards of mud and silt were deposited in the creeks and low areas to the south of Willoughby Bay, with the result that Mason's Creek was filled to a distance of approximately a mile upstream, at which point another retaining dyke had been constructed (Tr. 5–6; see map labeled Enclosure A, Pl. Ex. 2, original; cf. Govt. Ex. 31, original).[1] In order to provide drainage for the area formerly drained by Mason's Creek, the Government constructed an underground culvert leading from the unfilled portion of Mason's Creek and emptying into Willoughby Bay at a point to the east of the original outlet of Mason's Creek. This semi-circular culvert, some twenty feet in diameter and constructed at a cost of $500,000, was closed to navigation by an iron grill at the point where it emptied into the Bay (R. 24–25).

At about the time that these improvements were being undertaken by the Government, the respondent Commodore Park, Inc., acquired from the city of Norfolk for subdivision purposes a large tract of land located about a mile and a quarter from the mouth of Mason's Creek,

[1] The portion of Mason's Creek filled in by material dredged from Willoughby Bay is shown in red on Enclosure A (Tr. 6).

bounded on the west and southwest by two prongs of Mason's Creek, and on the north by Oast's Creek, a tributary of Mason's Creek (see Pl. Ex. 2, original).[2]

The respondent on June 8, 1942, brought suit under the Tucker Act, claiming that the closing of Mason's Creek had deprived it of the riparian right of access to deep water via Mason's Creek and Willoughby Bay into Hampton Roads (R. 1–3, 11–12). The complaint was subsequently amended to include damages alleged to have resulted from silt carried in suspension up Mason's Creek and deposited in Oast's Creek, and along the shores of respondent's property between the high and low water marks (R. 3, 12).

The Government moved to dismiss the complaint, on the grounds that the improvements were made in aid of navigation and in the exercise of the Government's navigation servitude; that the damages were consequential in character; and that there had been no taking which would give rise to an implied contract to pay compensation (R. 6–9). The District Court decided to take evidence and hear the case on the merits before passing upon the Government's motion to dismiss. After hearing evidence the court found as a fact that Mason's Creek was orig-

[2] On some exhibits and by several of the witnesses the northerly prong of Mason's Creek is denominated Darby's Creek. The court's findings and conclusions refer to this prong as part of Mason's Creek (see R. 24).

inally a navigable waterway of the United States, and that as a result of the dredging operations in Willoughby Bay and the deposit of spoil at the mouth of Mason's Creek, it no longer afforded the respondent access to Willoughby Bay (R. 23–25); that Oast's Creek was never navigable in fact though tidal in character; that the filling in of this creek by silt carried upstream had resulted in newly made land the value of which more than offset any damage caused by silting of Oast's Creek; and that the only deposits of silt above the high-water line were the result of subsequent dredging of Mason's and Oast's Creeks done by the Navy Department at the request of the landowners (R. 24, 25, 26–27).[3] It accordingly disallowed respondent's claim for damages allegedly caused by the silting in of Oast's Creek and by subsequent dredging operations in both creeks (R. 27–28). The court found, however, that the depositing of some silt in the bed of Mason's Creek in front of the respondent's land had in-

[3] There was no physical invasion here of any upland property owned by the respondent. The filled portion of Mason's Creek did not touch respondent's land at any point (Tr. 39–40, 41). Any silt which may have been deposited above the high-water line resulted from the subsequent dredging of Oast's Creek and Mason's Creek done at respondent's request, and which the district court held was noncompensable (R. 25–28). There was simply an interference with certain riparian rights—access to deep water—and the deposit of some silt in the bed of Mason's Creek opposite lots 206, 211–222, but below the high-water line (R. 12, 24, 26, 28, 29; Tr. 46, 77, 87, 125, 126, 127, 142, 143, 240).

jured certain of its lots riparian to this stream to the extent of $9,120; that the closing of Mason's Creek had relieved the respondent of the duty of constructing a boat harbor at the juncture of the two prongs of Mason's Creek; and that the dredging of such a harbor would have cost $1,250, which sum should be deducted from the damages suffered (R. 27–29). Having concluded as a matter of law that the dredging of Willoughby Bay and the closing of Mason's Creek had been done for "national defense purposes" rather than "in aid of navigation", the court entered judgment against the United States in the amount of $7,870 plus interest (R. 29–30).

On appeal all three judges of the court below agreed that the trial court erred in holding that the dredging of Willoughby Bay was not done for the purpose of aiding navigation or commerce (R. 41, 44). Judges Soper and Northcott held, however, that the filling in of Mason's Creek with the material removed from Willoughby Bay was not in aid of navigation, and accordingly affirmed the judgment of the District Court (R. 41–44). Judge Dobie dissented on the ground that the dredging operation was in furtherance of commerce and navigation, and that the deposit of the dredged material in Mason's Creek was an integral part of the improvement to navigation (R. 44).[4]

[4] Since the respondent took no cross-appeal below, the amended claim for damages allegedly caused by the silting in of Oast's Creek and the subsequent dredging of Mason's

SPECIFICATION OR ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the filling in of Mason's Creek with the material removed from Willoughby Bay was not in aid of navigation and commerce.

2. In holding that the deposit of dredged material in Mason's Creek was not an integral part of the improvement to navigation in Willoughby Bay.

SUMMARY OF ARGUMENT

Willoughby Bay and Mason's Creek, like other navigable waters of the United States, are the public property of the nation, and any private rights therein are subject to the servitude in respect of navigation created in favor of the federal government by the Constitution. This servitude extends to all lands below the ordinary high-water mark. When the Government, in the exercise of its power over navigation and commerce, interferes with the rights of riparian owners in land, the taking or injury is not compensable under the Fifth Amendment. Its power over navigable waters enables the United States to obstruct navigation at one place in order to improve

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Creek and Oast's Creek at respondent's request was eliminated from the case. The sole issue which remains is whether respondent can recover for depreciation in the value of its lots resulting from the loss of access to the navigable waters of Willoughby Bay via Mason's Creek and from the deposit of some silt on respondent's property between the high and low water marks (R. 27, 29).

navigation and commerce at another—without incurring any liability in damages for resulting interference with riparian rights.

The dredging of Willoughby Bay to provide a naval seaplane base was clearly in aid of commerce and navigation. That the seaplane facilities thus established are primarily to be used by naval craft does not make such improvements any the less aids to commerce and navigation. The filling in of Mason's Creek with the materials dredged from Willoughby Bay was an integral part of the improvement undertaken in Willoughby Bay. The power of the United States to improve the navigable waters of the nation by dredging operations comprehends the right to deposit the dredged material in other waters without the consent of the owner of the fee in the submerged soil and without becoming liable to him in damages. The administrative determination to deposit the dredged materials in Mason's Creek, if subject to judicial review, cannot be regarded as arbitrary or capricious.

ARGUMENT

I

IN THE EXERCISE OF ITS POWERS TO REGULATE COMMERCE AND TO MAINTAIN A NAVY, CONGRESS MAY DEPRIVE A RIPARIAN OWNER OF ACCESS TO NAVIGABLE WATERS WITHOUT INCURRING LIABILITY FOR COMPENSATION

The applicable principles of constitutional law are well-settled, and can be stated in axiomatic

form. The power of Congress over "waters which are capable of use as interstate highways," *U. S.* v. *Appalachian Power Co.,* 311 U. S. 377, 404, is derived primarily from the commerce clause of the Constitution. *Gibbons* v. *Ogden,* 9 Wheat. 1, 189; *Leovy* v. *United States,* 177 U. S. 621, 632. "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." *Gilman* v. *Philadelphia,* 3 Wall. 713, 724. The dominant power of the federal Government in respect of navigation extends to the entire bed of a stream, which includes all lands below the ordinary high-water mark. *United States* v. *Chicago, M., St. P. & P. R. Co.,* 312 U. S. 592, 596–597; *Willink* v. *United States,* 240 U. S. 572, 580; *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 263. Whether under local law title to the bed of the stream is vested in the riparian owner or retained by the State,[5] the rights of the title holder

[5] Whether a riparian proprietor's title to lands along a navigable river stops at the high-water mark, extends to the low-water mark, or continues to the thread of the stream, is a question of state law. *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 60; *Whitaker* v. *McBride,* 197 U. S. 510, 511–512. In some states, e. g., Washington, a riparian proprietor has no rights below the high-water mark, the state having reserved to itself title to the beds of all navigable

are always subject to the paramount servitude in respect of navigation created in favor of the federal Government by the Constitution. *Gibson* v. *United States*, 166 U. S. 269, 272; *Scranton* v. *Wheeler*, 179 U. S. 141, 163; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62–63; *New Jersey* v. *Sargent*, 269 U. S. 328, 337.

The power of Congress to improve navigable streams by removing obstructions or otherwise enlarging their navigability has been characterized as "absolute". *United States* v. *River Rouge Co.*, 269 U. S. 411, 419, cited in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 405. Determination of the necessity for an improvement in navigation, as well as its character and extent, is for Congress alone. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 596; *Scranton* v. *Wheeler*, 179 U. S. 141, 162; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 64. The exercise of these powers does not constitute an invasion of private property rights for which the United States must make compensation. Thus, when the federal Government, in order to improve navigation and commerce, appropriates a portion of a bed or a navigable stream for a pier, a lighthouse, a breakwater, or a dam, the taking is not com-

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streams. In other states, e. g., Nebraska, the riparian proprietor holds to the thread of the stream, the state having retained no title whatever. *Whitaker* v. *McBride*, 197 U. S. 510, 511. In still others, e. g., Virginia, private titles extend to the low-water mark, with title to the rest of the bed in the state. *Scott* v. *Doughty*, 124 Va. 358, 97 S. E. 802 (1919).

pensable under the Fifth Amendment; the injuries suffered by the private proprietor are *damnum absque injuria. Scranton* v. *Wheeler,* 179 U. S. 141, 163; *South Carolina* v. *Georgia,* 93 U. S. 4, 11, 12; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 62, 72; *United States* v. *Chicago, M., St. P. & P. R. Co.,* 312 U. S. 592, 596; *Stockton* v. *Baltimore & N. Y. R. Co.,* 32 Fed. 9 (C. C. N. J. 1887); *Hawkins Point Light-house Case,* 39 Fed. 77, 83 (C. C. D. Md. 1889).

The United States can obstruct navigation in one area in order to improve navigation and commerce elsewhere. *South Carolina* v. *Georgia,* 93 U. S. 4; *Friend* v. *United States,* 30 C. Cls. 94 (1895); *Scranton* v. *Wheeler,* 179 U. S. 141; *Gibson* v. *United States,* 166 U. S. 269; *Arizona* v. *California,* 283 U. S. 423, 451–452, *Bailey* v. *United States,* 62 C. Cls. 77 (1926), certiorari denied, 273 U. S. 751. In *South Carolina* v. *Georgia,* for example, the Government blocked the channel of the Savannah River to the north of Hutchinson's Island for the purpose of improving the southern channel. This deprived the lands along the northern channel of riparian rights which they had formerly enjoyed. In rejecting South Carolina's contention that the Government could not place obstructions in a navigable stream, this Court stated (93 U. S. at pp. 11–12):

> It is not * * * to be conceded that Congress has no power to order obstructions to be placed in the navigable waters

> of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage.

The Government has frequently closed shallow portions of a river to navigation by constructing piers and jetties therein in order to canalize or deepen the flow elsewhere. In *Scranton* v. *Wheeler,* 179 U. S. 141, the Government constructed a pier on the submerged land in front of the plaintiff's property, thus depriving him of all access to the navigable channel of the river and preventing freight from being landed on his property. The damages thus suffered were held not to be compensable. In *Gibson* v. *United States,* 166 U. S, 269, the Government constructed a dyke in the Ohio River which deprived the plaintiff of her previous right of access to the channel of the Ohio River, making it impossible for her to market truck garden products in the cities of Pittsburgh and Allegheny. In holding that her claim was *damnum absque injuria,* the Court said (pp. 275–276):

> * * * the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of

> the lawful and proper exercise of a governmental power * * *.
>
> In short, the damage resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject.

Clearly, therefore, if the dredging of Willoughby Bay and the filling in of Mason's Creek were authorized by Congress as an exercise of its powers to improve commerce and navigation, the resulting loss of riparian advantages suffered by the respondent was not compensable under the Fifth Amendment.

II

THE DREDGING OF WILLOUGHBY BAY AND THE FILLING IN OF MASON'S CREEK WERE PROJECTS AUTHORIZED BY CONGRESS, AND WERE IN AID OF COMMERCE AND NAVIGATION

Sections 9 and 10 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151, 33 U. S. C. secs. 401, 403, make it unlawful to fill or dredge a navigable waterway of the United States unless the work is first approved by the War Department. Accordingly, in compliance with these requirements the Naval Commandant applied for permits from the War Department for the dredging of Willoughby Bay and the filling in of Mason's Creek (R. 18–19). The application stated that the "development of lands east and

southeast of the Naval Operating Base just acquired for Air Station expansion will include a large seaplane operating base on the south shore of Willoughby Bay. One of the principal items of work will be improving the navigability of Willoughby Bay by dredging all or a large part of it to depths of from 10 to 14 feet below m. l. w. so as to provide sufficient areas and depths of water for large patrol seaplanes, which will operate from the Base. Materials dredged from Willoughby Bay will be deposited in creeks, sloughs, and on low areas of lands bordering Boush and Mason's Creeks behind steel or other types of bulkheads." (R. 18, cf. R. 19). The necessary permits were granted by the War Department (R. 20, 22, 23).

The uncontradicted testimony at the trial was that the waters of Willoughby Bay were deepened primarily for the use of naval seaplanes and naval craft employed in connection with the operation of large seaplanes (Tr. 17, 18, 37, 368). The district court concluded as a matter of law that "the dredging in Willoughby Bay was done in the course of and as an incident to enlarging and expanding the aviation shore facilities of the Hampton Roads Naval Operating Base for the purpose of national defense, and not for the purpose of aiding navigation or commerce" (R. 29).

This conclusion was erroneous, as all three judges of the Circuit Court of Appeals held. That the primary purpose of the dredging opera-

tions in Willoughby Bay was to provide an adequate depth for naval seaplanes and naval craft did not render the project any the less in aid of commerce and navigation. *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 268; *Bailey* v. *United States,* 62 C. Cls. 77 (1926), certiorari denied, 273 U. S. 751. In the *Greenleaf* case this Court held that the federal Government's navigation and commerce powers could be exercised for the benefit of its naval vessels. There the Secretary of War enlarged the harbor lines which his predecessor had fixed, with the result that the new lines cut off approximately 200 feet of the plaintiff's lumber pier. The company argued that the Secretary of War took that action at the suggestion of the Navy Department, which needed additional space in which to moor its vessels at the Norfolk Navy Yard. In answer to the claimant's contention, this Court said (p. 268):

> We may grant that such was the inducement and such the occasional use, but neither militates against the validity of the power exercised. The mooring of vessels is as necessary as their movement, and the navigability of a river can be maintained or increased as legally for the accommodation of war vessels as for trading vessels, those of public ownership as well as those of private ownership, and we cannot enter into a consideration of what may be necessary for either purpose.

So here we may grant that the primary reason for deepening Willoughby Bay was to provide a

sufficient depth of water for the landing, mooring, and servicing of naval seaplanes. We may further concede that in the interests of national security the deepened waters of Willoughby Bay will be used exclusively for that purpose during the present emergency.[6] It does not follow, from the fact that the navigation improvement was undertaken to provide facilities for public craft rather than commercial craft, that private owners of riparian land are entitled to compensation for an attendant loss of riparian advantages.

In *Bailey* v. *United States,* 62 C. Cls. 77 (1926), certiorari denied, 273 U. S. 751, the President had issued a proclamation "declaring it to be a military necessity to take possession of [said submerged] land for the uses of the naval service of the United States" (p. 93). In denying plaintiff's claim for damages thus caused to their oyster beds, the Court of Claims said (pp. 95–96):

> It is said by plaintiff that "A taking for naval purposes is not for purposes of navigation." This statement might, under some limitations, be true, but hardly so when the "naval purposes" directly involve navigation. It would be strange indeed if the sovereign might exercise its dominant right to provide necessary facilities for commercial vessels but could not provide any additional facilities made necessary for the use of naval vessels. * * *

[6] The record shows that commercial seaplanes are in fact using Willoughby Bay as an emergency landing area even at the present time (Tr. 50; cf. Tr. 314–316).

> Again it is said that "The Navy Department and the Secretary of the Navy were without authority to make an improvement for the purposes of navigation." The argument is difficult to follow since the delegation of authority over navigable waters to the Secretary of War by Congress is recognized. * * *

The Constitution gives Congress the power to maintain a navy, as well as to regulate commerce. Seaplane bases are obviously incidental to maintenance of a navy. Moreover, seaplanes are as much an instrumentality and means of commerce today as were sailing vessels at the time the Constitution was adopted. Protected waters of sufficient depth and area for landings and take offs, for servicing, repairs and refueling of seaplanes, are just as essential as the drydocks and submarine bases which were held to be aids to commerce and navigation in the *Greenleaf* and *Bailey* cases.

The court below was correct, therefore, in holding that the dredging of Willoughby Bay for the accommodation of naval seaplanes and naval vessels was in aid of commerce and navigation (R. 41, 44). The majority of the court was of the opinion, however, that the deposit in Mason's Creek of the material dredged from Willoughby Bay was not "in aid of navigation", and that such materials could not be deposited in these adjacent navigable waters of the United States except upon payment of just compensation for

resulting interference with riparian rights (R. 42–44). Judge Dobie dissented from this portion of the decision below. In his view the deposit of dredged material in Mason's Creek was an integral part of the improvement to navigation and commerce involved in the dredging of Willoughby Bay (R. 44).

We submit that this ruling of the court below is inconsistent with the principles settled in decisions of this Court. The cases already cited establish the plenary character of Congress' power with respect to improvements in aid of navigation and commerce. It is for Congress alone to determine the necessity for and scope of improvements in navigation. That this authority can be delegated within proper limits is equally well established. *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 268; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Bailey* v. *United States*, 62 C. Cls. 77, certiorari denied, 273 U. S. 751. In the *Bailey* case the Navy Department, in order to provide a submarine base and other naval facilities, had constructed a bulkhead across plaintiff's tract by driving a row of timber piles with sheet-piling between. (In Willoughby Bay, just outside of the parallel with the bulkhead, the Government dredged a 9-foot channel leading to Hampton Roads.) The dredged material was deposited behind the bulkhead, thus converting 10.6 acres of plaintiff's property into dry land, which the Navy proceeded to use for aviation purposes. As a re-

sult of these dredging and filling operations the plaintiff's oyster beds were completely destroyed. The owners' claim for damages was dismissed, and this Court denied certiorari.

There, as here, "the construction of the bulkhead and filling in of the space between it and the original shore line of the bay was a part of the program for constructing and providing a naval operating base * * * for the various uses of the United States Navy" (p. 84; cf. Tr. 17, 18, 37, 50, 368). There, as here, the dredging and filling was done pursuant to a permit issued by the War Department (p. 85; cf. 17–23). There, some of the dredged material was taken from Hampton Roads and deposited in a portion of Willoughby Bay which was theretofore navigable but which was thus converted into dry land to the damage of persons owning the oyster beds (pp. 85, 91). Here, the Government, in order to provide a seaplane base in Willoughby Bay, deposited the dredged material in Mason's Creek, a relatively unimportant body of water, thus closing it to navigation.

Implicitly, the action of the Navy Department in depositing the dredged materials in Mason's Creek was based upon a determination that such action was reasonable and proper in connection with the execution of the project for dredging Willoughby Bay. The scope of judicial review over such an administrative determination is not clearly settled. The point was left undecided in

Greenleaf Lumber Co. v. *Garrison*, 237 U. S. 252, 268. If the courts can inquire into whether the depositing of the dredged materials in Mason's Creek bore a reasonable relationship to the furtherance of navigation and commerce involved in deepening Willoughby Bay, we think the ruling below was wrong for at least two reasons.

First, as the record makes clear (R. 17–23), the deposit of the dredged material in Mason's Creek was, in a physical sense, integrally related to the improvement of navigation undertaken in Willoughby Bay. In the permits sought and obtained from the War Department, permission was granted "to construct dykes, bulkheads, and retaining walls in Mason's and Theleball's Creeks and to fill the portions of those bodies of water thus enclosed, with materials dredged from the Bay" (R. 16–17; cf. R. 18-23). The dredging and filling was accomplished by hydraulic means as a single integrated operation (R. 16). By closing Mason's Creek at its mouth and diverting the waters of this stream into the Bay at another point (R. 24–25), the Navy Department prevented the continued deposit of silt in the dredged-out portion of Willoughby Bay (see Govt. Ex. 34, Original).

Secondly, there is no basis in the record for any inference that the decision of the responsible officials of the War and Navy Departments was arbitrary or capricious, or in any wise actuated by improper considerations. Here, as in the *Green-*

leaf case, "If it can be said that arbitrary or wanton action of the [Navy Department] would be subject to judicial review, it cannot be said that [its] action in the case at bar reached that bad degree." (237 U. S. at 268). The possibility that the improvements in Willoughby Bay might have been achieved in some other way would appear to be immaterial. The record indicates that the decision to deposit the dredged material in Mason's Creek was based upon considerations of economy and feasibility in carrying out the improvement project. Cf. Tr. 359, 362. The burden surely rests upon the respondent to show that the filling in of Mason's Creek, motivated by considerations of such a character, was arbitrary and did not bear any rational relation to the improvement of navigation and commerce authorized by Congress. This burden has not been met.

In 22 Op. A. G. 646 (1899), Attorney General Griggs was asked whether the city of Chicago would legally prohibit the dumping of material dredged from the harbor of Chicago in portions of Lake Michigan designated for that purpose by the Secretary of War. In holding that the city could not interfere with these operations, the Attorney General said (p. 651):

> * * * Congress has power to regulate and improve the harbors of the navigable waters of the United States by dredging the bottom and deepening the water, or by such other ways as it deems necessary in aid of navigation. And this, of course,

> carries with it the right to deposit the material thus removed in any other part of the harbor or the navigable waters of the United States, or other places within its control.

The majority in the instant case sought to distinguish this opinion on the ground that Attorney General Griggs did not expressly say that this could be done without the payment of compensation. Whatever may be thought of this attempted distinction,[7] it cannot explain the subsequent opinion of Attorney General Wickersham in 28 Op. A. G. 433 (1910). There, the Secretary of War proposed to improve the main navigable channel in the Hudson River and to deposit the excavated material in the areas of shoal water behind and shoreward of existing harbor lines. The question arose whether this could be done without the consent of the riparian owners thus affected and without the making of compensation. Attorney General Wickersham concluded that there was no doubt that the federal

[7] The attempted distinction seems unsound. Attorney General Griggs was no doubt familiar with the famous case of *Illinois Central R. R.* v. *Illinois*, 146 U. S. 387, decided 7 years earlier. There the Supreme Court had held that title to a portion of the bed of Lake Michigan had passed to the State of Illinois upon her admission into the Union and the State in turn had granted some of these submerged lands to the city of Chicago. In attempting to prohibit the dumping operations the city was no doubt relying, in part, upon its title to the lands in question. The qualifications contained in Attorney General Griggs' opinion are rather pointless if the question of compensation was not involved.

Government, under its power with respect to interstate commerce, could "take material excavated from one portion of the bed of a river and deposit it in another portion of that bed (whether deep or shoal water); and this without the consent of the owner of the fee in the submerged soil and without compensation to him" (p. 434).

The holding of the court below would subject the Government to liability in every case where it dredges material from one portion of a navigable body of water, and for reasons of convenience, economy, and the like, deposits such material in adjacent navigable waters to the damage of some riparian owner. Such a rule would seriously depreciate the commerce and navigation servitude given the federal Government by the Constitution.

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed with directions to dismiss the complaint.

Respectfully submitted,

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